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Public Prosecutor v Vira Prihatin & Ors

B HIGH COURT (JOHOR BAHRU) — CRIMINAL REVISION NO MTJ (1) JA-43–11–07 OF 2017
COLLIN SEQUERAH J
7 MARCH 2018

C *Criminal Procedure — Revision — Application to revise magistrate's order — Applicant applied for interim protection order for respondents — Senior assistant registrar granted interim protection order for period of 14 days — Whether expression shall in s 44(2) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 mandatory in nature or merely directory with regard to time frame of 21 days — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 44(2) & 51 — Criminal Procedure Code s 323*

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E During a raid conducted on Pusat Urutan Refleksologi Nico located in Johor Bahru, the police managed to rescue all the respondents who were suspected to be trafficked person. In the course of investigation, the investigating officer applied for an interim protection order ('IPO') at the Magistrate Court Johor Bahru for a period of 21 days pursuant to s 44(2) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act'). The application F was heard by the senior assistant registrar ('SAR') who granted the IPO but for a duration of only 14 days. Aggrieved by the SAR's decision, the applicant filed the present application for revision under s 323 of the Criminal Procedure Code. The applicant contended that the expression 'shall' employed in s 44(2) G of the Act indicated that the requirement was mandatory in nature, therefore, the magistrate had no discretion to shorten the period of the IPO.

Held, setting aside the 14 days period imposed by the magistrate and ordering the IPO to be for the stipulated period of 21 days:

H (1) The 21 days period was important in order to enable the necessary investigation and enquiry to be carried out pursuant to s 51 of the Act. There was no provision in s 44 of the Act that allowed for an extended period of time beyond the 21 days. If a shorter period be allowed for the IPO and should the investigations not completed within that time, there I was no recourse to seek for an extended period of time. Taken as a whole and read in the proper context, the only reasonable construction therefore was that the stipulated 21 days period was meant to be mandatory. Any other construction would militate against the intention of the Legislature in requiring the investigation and enquiry to be

completed within the stipulated period and no further. To shorten what already might be an extremely short time frame for the authorities to investigate would be to defeat the purpose of the section (see paras 35–37 & 41).

[Bahasa Malaysia summary

Semasa serbuan dibuat pada Pusat Urutan Refleksologi Nico yang terletak di Johor Bahru, polis dapat menyelamatkan kesemua responden yang disyaki sebagai orang mengedar. Sepanjang siasatan, pegawai penyiasat telah memohon untuk perintah perlindungan sementara ('IPO') di Mahkamah Majistret Johor Bahru untuk tempoh 21 hari menurut s 44(2) Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ('Akta tersebut'). Permohonan itu telah didengar oleh penolong kanan pendaftar ('PKP') yang memberikan IPO itu tetapi untuk tempoh 14 sahaja. Terkilan dengan keputusan PKP, pemohon telah memfailkan permohonan ini untuk semakan di bawah s 323 Kanun Tatacara Jenayah. Pemohon berhujah bahawa istilah 'shall' yang digunakan dalam s 44(2) Akta tersebut menunjukkan bahawa keperluan itu adalah bersifat mandatori, oleh itu, majistret tiada budi bicara untuk memendekkan tempoh IPO itu.

Diputuskan, mengetepikan tempoh 14 hari yang dikenakan oleh majistret dan memerintahkan IPO itu untuk tempoh yang ditetapkan selama 21 hari:

(1) Tempoh 21 hari itu adalah penting bagi tujuan membolehkan siasatan dan inkuiri yang perlu dilaksanakan menurut s 51 Akta tersebut. Tiada peruntukan dalam s 44 Akta tersebut yang membenarkan untuk lanjutan tempoh masa melebihi 21 hari. Jika tempoh yang lebih pendek dibenarkan untuk IPO itu dan jika siasatan itu masih belum selesai dalam tempoh masa tersebut, tiada jalan keluar untuk memohon suatu lanjutan tempoh masa. Berdasarkan keseluruhannya dan dibaca dalam konteks sebenar, satu-satunya pentafsiran yang munasabah adalah bahawa tempoh 21 hari yang ditetapkan itu bertujuan untuk menjadi mandatori. Sebarang pentafsiran lain adalah bercanggah dengan niat Perundangan yang menghendaki siasatan dan inkuiri selesai dalam tempoh yang ditetapkan dan tidak lebih dari itu. Untuk memendekkan apa yang sememangnya tempoh masa yang sangat singkat untuk pihak berkuasa menyiasat tidak akan mancapai tujuan seksyen tersebut (lihat perenggan 35–37 & 41).]

Notes

For cases on application to revise magistrate's order, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3878–3879.

Cases referred to

Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301, CA (refd)

PP v Kulasingam [1974] 2 MLJ 26 (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 44, 44(2), 51

Criminal Procedure Code ss 323, 325

Immigration Act 1959/63

Safiah bt A Aziz (Deputy Public Prosecutor, Johor State Legal Advisor's Office) for the applicant.

The respondents were unrepresented.

Collin Sequerah J:

INTRODUCTION

[1] This application for revision raises the issue of whether an interim protection order ('IPO') made under s 44(2) of the Anti-Trafficking In Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) ('the ATIPSOM') for a person suspected to be a trafficked person to be placed at a place of refuge for the purpose of carrying out an investigation and enquiry under s 51, must be for the stipulated period of twenty-one days or may be for a shorter period.

PERTINENT FACTS

[2] The pertinent facts reveal that on 7 July 2017, ASP Muhammad Hafez from D7C, Bukit Aman conducted a raid on the Pusat Urutan Refleksologi Nico at No 27-01 and 2702, Jalan Austin Perdana 3/8, Taman Mount Austin, 81100 Johor Bahru, Johor.

[3] During the said raid, ASP Muhammad Hafez managed to rescue the six above-named respondents suspected to be trafficked persons. The six respondents were from various surrounding countries including Indonesia, Thailand and Vietnam.

[4] A police report, Setia Indah Report No 6740-6741/17, in connection with the said raid was lodged by the said ASP Muhammad Hafez and the case was investigated by the investigating officer, Insp Ahmad Zuhaidi ('IO').

[5] In the course of his conduct of the investigation, the IO made an application for an IPO at the Magistrates Court at Johor Bahru on 8 July 2017 for a period of 21 days pursuant to s 44(2) of the ATIPSOM. The application was heard by the senior assistant registrar ('SAR') who however, granted the IPO for a duration of only 14 days.

THIS APPLICATION

[6] By way of this application for revision, the applicant contends that the magistrate or presiding officer hearing such application must make an IPO for a period of 21days for the purpose of carrying out an investigation and enquiry under s 51 of the ATIPSOM.

[7] In other words, the applicant submits that the expression 'shall' employed in s 44(2) of the ATIPSOM connotes that the requirement is mandatory in nature. It was submitted that the magistrate has no discretion to shorten the period of the IPO.

[8] The issue to be decided then is whether or not the expression 'shall' in the context of the wordings in s 44(2) of the ATIPSOM is mandatory in nature or merely directory with regard to the time frame of 21 days.

POWERS OF REVISION

[9] At the outset, it is necessary to be reminded that what is sought to be invoked are the revisionary powers of this court pursuant to s 323 of the Criminal Procedure Code ('the CPC'). The powers of a judge upon revision are contained in s 325 of the CPC which reads:

> 325 Powers of judge on revision
>
> (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had on opportunity of being heard, either personally or by advocate, in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction

[10] These powers were also explained by Hashim Yeop Sani J (as he then was) in *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26 as follows:

> The powers of the High Court in revision are amply provided under s 325 of the Criminal Procedure Code subject only to sub-ss (ii) and (iii) thereof. *The object of*

A *revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice*. (Emphasis added.)

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[11] *Mallal's Criminal Procedure* (7th Ed) at p 581 in explaining the difference between appellate and revisional jurisdiction stated:

> In an appeal it is the duty of the appellate court to examine the evidence and come to an independent finding on each issue of fact but a court sitting in revision deals with questions of evidence or disturbs the finding of fact by the lower court only in very exceptional cases, to prevent a miscarriage of justice.

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[12] The principle objective then of the revisionary powers of the court is to correct or prevent a miscarriage of justice.

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ANALYSIS AND DECISION

[13] This application for this court to exercise its revisionary powers was made by the prosecution notwithstanding that at the time this application was heard, the interim protection orders (IPO) made in respect of the respondents had already expired on 21 July 2017 and the respondents were undergoing trial at the magistrates court for an offence under the Immigration Act 1959/63.

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[14] The prosecution however urged this court to nevertheless proceed with the revision even though it was rendered academic in nature at the point in time, in order to clarify what is the proper duration of an IPO made under s 44(2) of the ATIPSOM and also for the purpose of serving as a precedent for future cases.

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[15] Only the first respondent was present in court but was not represented.

[16] Section 44 of the ATIPSOM reads as follows:

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> 44 Taking a person into temporary custody
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> (1) An enforcement officer may, on reasonable suspicion that any person who is found or rescued is a trafficked person, take that person into temporary custody and produce him before a Magistrate within twenty-four hours, exclusive of the time necessary for the journey to the Magistrate's Court, for the purpose of obtaining an interim protection order.
>
> (2) *The Magistrate shall make an interim protection order for the person to be placed at a place of refuge for a period of twenty-one days for the purpose of carrying out an investigation and enquiry under section 51.*

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(3) The enforcement officer shall, upon obtaining the order issued under subsection (2), surrender the trafficked person to a Protection Officer to place that trafficked person at the place of refuge specified in the order.

[17] Before commencing the present analysis, it is apposite to note that s 44(2) of the Principal Act was amended vide ATIPSOM (Amendment) 2015 Act (A1500) which came into force on 18 November 2015 (PU (B) 460/2015) to replace the stipulated period of the IPO from 14 days to the present 21 day period.

[18] It cannot however be assumed that the magistrate was necessarily labouring under the misapprehension that the 14 day duration was the maximum period of time stipulated under s 44(2) at the time of his decision. In other words, it is not known whether the magistrate was aware of the amendment from 14 days to 21 days when he made the IPO.

[19] This matter cannot be positively ascertained simply because there are no grounds of decision by the magistrate. The magistrate must therefore to be taken to have been aware of the fact that the stipulated duration under s 44(2) was for a period of 21 days but nevertheless chose to grant the IPO for 14 days only for reasons best known to him. It is on this basis that this judgment therefore proceeds.

[20] The focal point for the purposes of the present discussion is the word 'shall' in s 44(2) of the ATIPSOM. Although there have been numerous authorities in respect of whether the phrase 'shall' is mandatory or merely directory in nature, it is nevertheless important to consider this issue in the specific context of the said s 44(2) of the ATIPSOM.

[21] Online research conducted on the meaning of the phrase 'shall' in Words, Phrases and Maxims, sourced at http://www.lexisnexis.com/my/legal/delivery, revealed the following:

> The word 'shall' in its ordinary signification is mandatory though there may be considerations which would influence the court in holding that the intention of the Legislature was to give a discretion.
>
> The use of the words 'shall' or 'may' is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstance that the Legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. See *G C Patel v Agricultural Produce Market Committee* (1975) 2 SCC 482, at 488; *Re Panchami* 1981 LW (Cr) 112.
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> It is well-known that the use of the word 'shall' is not conclusive of the question whether a provision is mandatory. See *Hari Vishnu Kamath v Ahmad Ishaque*

A [1955] 1 SCR 1104; AIR 1955 SC 233. The intention of the Legislature has to be gathered from the whole statute. See *Rani Drigraj Kuer v Raja Sri Amar Krishna Narain Singh* AIR 1960 SC 444 at 448–449. The construction ultimately depends on the provision itself keeping in view the intendment of the enactment and the context in which the word 'shall' has been used. See *Vali Pero v Fernando Lopez* (1989) 4 SCC 671, at 680; AIR 1989 SC 2206.

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[22] The first thing to note from the above is the fact that just because the word 'shall' is used, although ordinarily indicative that it is meant to be mandatory in nature, is not conclusive and depending on the intention of the Legislature, may connote that it is merely directory in nature.

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[23] *NS Bindra's Interpretation of Statute* (8th Ed) at pp 590–591 (also extracted from the same source above), states:

D *Whether a statute is mandatory or directory, depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intentions of the Legislature are the governing factor, and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it one way or the other*. In determination of the question whether a provision of law is directory or mandatory the prime object must be to ascertain the legislative intent, from a consideration of the entire statute, its nature, its object and the consequences that would result from construing it in one way or the other, or from such statute in connection with other related statutes, and the determination does not depend on the form of the statute. *'It appears to be well settled that in order to judge the nature and scope of a particular statute or rule, ie, whether it is mandatory or directory, the purpose for which the provision has been made, and its nature, the intention of the Legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory. Further to this end, an enquiry into the purpose behind the enactment of the Legislature must always be made'.* (Emphasis added.)

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[24] In *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301, Gopal Sri Ram JCA (as he then was) held:

H *It is to be noticed at once that the section uses the word 'shall' in each of its subsections. Learned counsel for the appellants submitted that this points to the section being imperative or mandatory. He cited no authority in support, presumably because he considered the point beyond argument*. However, the learned state legal adviser argued that compliance with s 4(1), or indeed any of the other subsections of that section is not mandatory. She submitted that the word 'shall' in s 4(1) was merely directory and not mandatory. In support of her argument, she cited *Grunwick Processing Laboratories Ltd and others v Advisory, Conciliation and Arbitration Service and another* [1978] AC 655. But I really do not think that that case is of any assistance. That was a case involving s 14(1) of the United Kingdom Employment Protection

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Act 1975. The issue was whether the word 'shall' appearing in that section was mandatory or directory. It was in the particular context of that case that Lord Salmon said in his speech (at p 698):

> The result of this appeal turns solely on whether that part of s 14(1) which I have cited is mandatory or directory. Prima facie the word 'shall' suggests that it is mandatory but that word has often been rightly construed as being directory. Everything turns on the context in which it is used: the subject-matter, the purpose and effect of the section in which it appears.

...

Bearing in mind what has been said in the cases referred to above, *I turn now to consider whether the word 'shall' in s 4(1) of the Act is mandatory or merely directory. In doing so, I take into account the fact that regard must be had to s 4(1) not in isolation but in the context of the Act when read as a whole.*

...

Thus, *when s 4(1) is read in the context of the Act as a whole, it is clear that the word 'shall' that appears in that subsection is mandatory and not merely directory in effect. Put in another fashion, the word 'shall' prima facie denotes a mandatory provision and there is nothing in the context of the Act that points to a contrary meaning.* (Emphasis added.)

[25] It is clear therefore that in determining whether use of the phrase 'shall' is mandatory or directory in nature, regard must be had to the intention of the Legislature and the particular context in which the word was used although prima facie it denotes a mandatory provision.

[26] The preamble to the ATIPSOM states that it is an Act to prevent and combat trafficking in persons and smuggling of migrants and to provide for matters connected therewith.

[27] Section 2 of the ATIPSOM ('the Act') is the interpretation section and defines 'smuggled migrant' as a person who is the object of the act of smuggling of migrants, regardless of whether that person participated in the act of smuggling of migrants. The same section defines a 'trafficked person' as any person who is the victim or object of an act of trafficking in persons.

[28] The avowed objective of the Act is therefore to prevent and combat trafficking in persons and smuggling of migrants and to that end it has also clearly defined in rather wide terms these categories of persons.

[29] Any interpretation of the provisions in the Act must therefore be construed with reference to the intended objective of the Legislature in enacting such provisions.

[30] Now, the purpose for the magistrate in making the IPO is for the person to be placed at a place of refuge for a period of 21 days for the purpose of carrying out an investigation and enquiry under s 51.

[31] Section 51 of the Act reads:

> 51 Investigation, enquiry and Protection Order
>
> (1) Where an interim protection order is made under subsection 44(2), within twenty-one days from the date of such order —
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> (a) an enforcement officer shall investigate into the circumstances of the person's case for the purpose of determining whether the person is a trafficked person under this Act; and
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> (b) a Protection Officer shall enquire into the background of that person.
>
> (2) Upon completion of the investigation and enquiry under subsection (1), the enforcement officer and the Protection Officer shall jointly prepare a report and produce the report together with the person before a Magistrate's Court for the purpose of satisfying the Magistrate that such person is a trafficked person under this Act.
>
> (3) Where the Magistrate, having read the report produced under subsection (2), is satisfied that the person brought before him —
>
> (a) is a trafficked person and in need of care and protection, the Magistrate may make a Protection Order —
>
> (i) in the case of a trafficked person who is a citizen or permanent resident of Malaysia, ordering that such trafficked person be placed in a place of refuge for a period not exceeding three months from the date of the order; or
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> (ii) in the case of a trafficked person who is a foreign national, ordering that such trafficked person be placed in a place of refuge for a period not exceeding three months from the date of the order, and thereafter to release him to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63,
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> (b) is not a trafficked person, the Magistrate may —
>
> (i) in the case of a person who is a citizen or permanent resident of Malaysia, order that person to be released; or
>
> (ii) in the case of a person who is a foreign national, order that person to be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63.

[32] The reason therefore for the 21 day period is so that investigations can be conducted into the circumstances of the person's case for the purpose of

determining whether the person is a trafficked person after which a report is prepared for the purpose of satisfying the magistrate that such person is a trafficked person.

[33] Where the magistrate after having read the said report is satisfied that the person is a trafficked person, a protection order (PO) may be made with the view, inter alia, that the person is placed in a place of refuge for a period of time.

[34] It can be seen that the ultimate objective is to facilitate the protection of the person so that eventually, that person can either be dealt with in accordance with the appropriate immigration laws or in the case of a citizen or permanent resident of this country, be released.

[35] The 21 period therefore is important in order to enable the necessary investigation and enquiry to be carried out pursuant to s 51. This would tend to suggest that a mandatory connotation is called for in interpreting the period of time stipulated under s 44(2) of the Act.

[36] There is no provision in s 44 that allows for an extended period of time beyond the 21 days should the stipulated period be insufficient for investigations or the enquiry to be completed.

It is clear then that the intention of the Legislature here was that the said investigation or enquiry must be completed within the 21 day period. It is a well-known maxim that Parliament does not legislate in vain.

[37] If it were to be construed otherwise and a shorter period be allowed for the IPO and should investigations not be completed within that time, there appears to be no recourse to seek for an extended period of time.

[38] To fortify these findings, the *Hansard* dated 3 August 2010 in relation to the amendment to s 44(2) read as follows:

> Fasal 19 bertujuan untuk meminda subseksyen 44(2) akta untuk mewajibkan majistret mengeluarkan perintah perlindungan sementara sekiranya pegawai penyiasat mengesyaki secara munasabah bahawa orang yang ditahan dalam jagaan sementara ialah orang yang diperdagangkan.

[39] The intention therefore was to mandate the magistrate in issuing the IPO in the event the investigation officer had reasonable cause to suspect that the person is a trafficked person.

[40] To put the whole matter beyond doubt, sub-s 44(2) of the principal Act was amended by substituting for the word 'may' the word 'shall' by the ATIPSOM (Amendment Act) 2010 Act A1385 which came into force from

15 November 2010 (PU (B) 500/2010).

[41] Taken as a whole and read in its proper context, the only reasonable construction therefore is that the stipulated 21 day period was meant to be mandatory. Any other construction would militate against the intention of the Legislature in requiring the investigation and enquiry to be completed within the stipulated period and no further. To shorten what already may be an extremely short time frame for the authorities to investigate would be to defeat the purpose of the section.

[42] Malaysia is committed to the reduction and eradication of human trafficking. The construction therefore that would facilitate, promote, and achieve this objective is to be preferred.

[43] In the premises, I accordingly exercised my powers under s 323 of the Criminal Procedure Code and set aside the fourteen day period for the IPO imposed by the magistrate. I therefore ordered that the IPO under s 44(2) of the ATIPSOM be for the stipulated period of 21 days. Although purely academic in nature, this decision may perhaps serve as useful guidance in future cases of this nature.

Fourteen days period imposed by magistrate set aside; court ordered IPO to be for stipulated period of 21 days.

Reported by Dzulqarnain Ab Fatar